

D&O Trends to Watch in 2021

Organizations trust their senior leaders to make important decisions and act with stakeholders' (e.g., shareholders, customers and employees) best interests in mind. However, in today's climate of increased corporate accountability, protecting your senior leadership team from directors and officers (D&O) liability exposures can be a significant challenge—making D&O coverage a crucial aspect of your organization's risk management program.

Put simply, D&O insurance can help protect your organization's senior leaders from the costly consequences of engaging in alleged or actual "wrongful acts" while performing their job duties.

Apart from securing D&O coverage, it's important to stay up to date on the latest D&O market trends. In doing so, your organization will have the information needed to respond appropriately and make any necessary coverage adjustments. Don't let your organization fall behind in this evolving risk landscape. Review this guidance to learn more about D&O trends to watch in 2021.

The COVID-19 Pandemic

The ongoing COVID-19 pandemic has forced many organizations to make serious operational changes—such as conducting office closures, having employees work remotely, halting business travel, conducting furloughs or layoffs, making financial adjustments and altering various workplace procedures to comply with new health and safety standards.

Such changes can carry a wide range of D&O exposures, seeing as there is the potential for organizational stakeholders to allege that your senior leadership team committed wrongful acts in the process of making these workplace changes. On the other hand, a lack of such changes within your organization can also cause D&O liability concerns, as stakeholders could allege that your

senior leaders were negligent and failed to respond appropriately to COVID-19. These types of allegations have become increasingly prevalent in the form of class-action lawsuits.

With this in mind, it's crucial to work closely with senior leadership to identify any organizational risks that may arise from the pandemic and determine a course of action that prioritizes the needs of your stakeholders. In addition, any workplace adjustments related to COVID-19 should be diligently evaluated prior to implementation to ensure regulatory compliance and minimize legal or financial fallout. Further, organizational procedures should be closely monitored and updated as needed to reflect frequently changing federal, state and local COVID-19 requirements.

Insolvency Issues

The global recession caused by the COVID-19 pandemic has led to major financial disruption for many organizations. These economic struggles have resulted in a wide range of employers going bankrupt or experiencing insolvency issues.

Insolvency is a key contributor to D&O claims for both publicly and privately held organizations. Insolvency-related claims can result from stakeholders alleging that senior leaders failed to properly plan for financial disruption or did not respond correctly to prolonged periods of reduced revenue, ultimately putting the senior leadership team at fault for the financial hardship.

That being said, as this economic downturn continues, it's important for your senior leaders to follow safe and secure financial practices (e.g., timely payments, educated investments, accurate documentation and reasonable reimbursement procedures), as well as be transparent with stakeholders about your organization's economic state to avoid misrepresentation concerns.

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Cybersecurity

As workplace technology continues to advance, so do the tactics of cybercriminals. What's more, the growing number of employees working remotely due to the COVID-19 pandemic has resulted in additional cyber exposures for organizations.

When cyberattacks occur, costly consequences can often lead to D&O claims. Specifically, stakeholders affected by a cyberattack may allege that your senior leadership team failed to properly address cybersecurity threats or establish a plan for responding to an attack.

To reduce the likelihood of such claims occurring, it's crucial for your senior leadership team to be actively involved in monitoring your organization's unique cyber risks, implementing proper cybersecurity practices to help prevent potential attacks (especially in the realm of remote work arrangements), ensuring compliance with all applicable data security standards and establishing an effective cyber incident response plan to minimize any damages in the event of an attack.

ESG Concerns

Various environmental, social and governance (ESG) topics have also impacted the D&O market in recent years. In the realm of environmental concerns, a cultural shift regarding the pressing issue of climate change—evidenced by a continued surge in natural disasters worldwide (e.g., earthquakes, wildfires and hurricanes)—has resulted in an increased demand on organizations across industry lines to “go green,” thus holding senior leaders accountable for ensuring eco-friendly operations. This shift also led to a rise in environmental legislation and enforcement from governing bodies, making it all the more vital for your senior leadership team to take steps to reduce your organization's carbon footprint.

Several social movements have recently led to an increase in lawsuits and claims against senior leaders as well, including the #MeToo movement and the Black Lives

Matter movement.

The #MeToo movement is an anti-sexual harassment campaign that was originally founded in 2006 and has gained significant social media attention since 2017. The movement has contributed to a sharp rise in D&O litigation, as employees and other stakeholders have come forward to allege that organizations' senior leaders engaged in sexual harassment or acted negligently in their response to other allegations of sexual harassment.

Such litigation emphasizes the importance of enforcing a zero-tolerance policy on sexual harassment, taking any reports of such behavior seriously and requiring your senior leadership team to participate in routine sexual harassment awareness training.

The Black Lives Matter movement—which is a racial justice campaign that was originally founded in 2013 and resurged in 2020 in the form of nationwide protests—has also begun making a major impact on the D&O market.

Since its resurgence, the movement has caused organizational stakeholders to call out senior leaders on their alleged failures to promote equality and inclusion in the workplace, as well as ask for greater racial diversity among senior leadership teams. This movement makes it increasingly critical for you to work closely with your senior leaders to foster an inclusive workplace and ensure diverse representation within your leadership team.

Derivative Claims

Although D&O claims in general have soared in the past decade, one form of claim in particular—known as a derivative claim—has become increasingly prevalent.

In such a claim, one or more of your shareholders will file a lawsuit on behalf of your organization against a specific individual (or several individuals) on your senior leadership team rather than the whole team or board. Derivative claims are often caused by “event-driven”

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lawsuits, in which shareholders allege that particular members of your senior leadership team failed to act accordingly in the midst of large-scale disasters or trends—such as the COVID-19 pandemic, cybersecurity breaches, climate change and social movements.

In addition to derivative claim frequency, these lawsuits are also more prone to “mega claim” status, resulting in settlements of \$100 million or more. Because derivative claims are often so costly and typically non-indemnifiable, it’s crucial to ensure that your D&O policy contains adequate Side A insurance. This form of coverage can insure individual senior leaders against losses that your organization is not legally or financially able to indemnify, thus protecting the personal assets of your senior leadership team.

The Hard Market

Lastly, several factors—namely, the occurrence of various large-scale disasters accompanied by a subsequent increase in both D&O claim frequency and cost—have contributed to the continued hard insurance market.

In this hard market, employers like you may experience a more difficult renewal process by way of increased D&O insurance premiums, lowered capacity, and more stringent policy requirements or restrictions—especially as it pertains to high-demand coverage elements, such as Side A insurance.

Nevertheless, these market conditions should not discourage you from securing adequate insurance for your organization. After all, keeping your organization (and its senior leaders) properly protected from potential losses is well worth the cost.

We’re Here to Help

You don’t have to respond to this changing risk landscape alone. We’re here to help you navigate these D&O market trends with ease. For additional coverage guidance and solutions, contact us today.

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